

CHONG WOUI LEONG & ORS*a*

v.

LEBBEY SDN BHD

COURT OF APPEAL, KUALA LUMPUR

b

NH CHAN JCA

ABU MANSOR ALI JCA

AHMAD FAIRUZ JCA

[CIVIL APPLICATION NO: B-02-407-97]

6 MARCH 1998

[1998] CLJ JT(6)

c

CIVIL PROCEDURE: *Execution - Stay - Jurisdiction - Court of Appeal - Whether Court of Appeal has jurisdiction to stay its prior order pending appellant's application to Federal Court for leave to appeal - Rules of the Court of Appeal 1994, rr. 4 & 76 - Schedule to Courts of Judicature Act 1964, para 6 - Rules of the High Court 1980, O. 92 r. 4 - Courts of Judicature Act 1964, s. 79 - Rules of the Federal Court 1995, r. 53*

d

CIVIL PROCEDURE: *Appeal - Appeal from Court of Appeal to Federal Court - Whether appeal lies as of right - Whether only Federal Court can grant leave to appeal - Whether only a right to apply to Federal Court for leave to appeal or a right to appeal - Whether there is an appeal before Federal Court when leave to appeal has not been granted by Federal Court - Whether application for leave to appeal amounts to an appeal - Finality of decision of Court of Appeal - Courts of Judicature Act 1964, s. 96*

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CIVIL PROCEDURE: *Execution - Stay - Whether Court of Appeal has jurisdiction to stay its prior order pending appellant's application to Federal Court for leave to appeal - Whether appeal lies as of right - Whether Court of Appeal may grant stay when there is no appeal as of right - Whether there are special or peculiar grounds under which Court of Appeal may grant stay - Whether only Federal Court can grant stay - When may Federal Court or Court of Appeal grant stay - Courts of Judicature Act 1964, ss. 80, 97(2), 102 - Rules of the Federal Court 1995, r. 52*

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The instant application by notice of motion to the Court of Appeal was for a stay of execution in respect of a prior judgment of the Court of Appeal giving vacant possession to the respondent. The order of stay was sought by the appellants pending their application to the Federal Court for leave to appeal against the aforesaid judgment of the Court of Appeal.

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- a* The issue of law central to the instant application was whether the Court of Appeal has the jurisdiction to stay the execution of an order that it has already made pending an application by an appellant to the Federal Court for leave to appeal against such an order of the Court of Appeal.

Held:

- b* **Per NH Chan JCA (dissenting)**

- c* [1] An appeal can only lie from the Court of Appeal to the Federal Court with the leave of the Federal Court. Only the Federal Court has the right to grant such leave to appeal. [Courts of Judicature Act 1964, s. 96 ('CJA')]. A party dissatisfied with a decision of the Court of Appeal has a right to apply for such leave from the Federal Court. It is, however, **not** a right to appeal, but only a right to apply to the Federal Court for leave to appeal. A right to appeal only arises when leave to appeal has been granted. An application for leave to appeal is **not** an appeal.

- d* [1a] There is **no** appeal as of right from the Court of Appeal to the Federal Court. Thus, unless and until leave to appeal has been granted by the Federal Court, there is **no** appeal at all before the Federal Court. The decision of the Court of Appeal is final and conclusive unless the Federal Court grants such leave to appeal.

- e* [1b] In the present case, leave to appeal had yet to be granted by the Federal Court. Hence, there was **no** appeal pending from the Court of Appeal to the Federal Court, and, as such, there was **no** justification for the Court of Appeal to stay the execution of its aforesaid judgment from which there was **no** right to appeal. The respondent was entitled to the fruits of his judgment. It would be absurd to insist that 'the appeal' would be rendered nugatory if a stay was not granted when, in fact, there was no appeal at all before the Federal Court.

- f* [1c] It is absolutely unheard of to stay proceedings upon the judgment of a court from which there is no appeal as of right. To stay execution because the court doubts whether it has given a proper judgment will be unworthy of a court of appeal.

- g* [2] By virtue of s. 102 of the CJA and r. 52 of the Rules of the Federal Court 1995 ('the RFC'), the Federal Court or the Court of Appeal may order a stay, **but** only when there is an appeal or when leave to appeal has been granted and an appeal can be instituted. An application for leave to appeal is **not** an appeal.

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[2a] When there is an appeal or when leave to appeal has been granted and an appeal can be instituted, s. 79 of the CJA and r. 53 of the RFC provide that the application for a stay shall be made in the first instance to the Court of Appeal. a

[3] Section 97(2) of the CJA empowers the Federal Court, **when granting leave** to appeal, to either direct the judgment appealed against to be carried into execution or order a stay of execution pending the appeal. In the present case, the appellants could still apply to the Federal Court for a stay of execution under s. 97(2) of the CJA. b

Held:

Per Abu Mansor Ali & Ahmad Fairuz JJCA (majority) c

[1] Rule 76 of the Rules of the Court of Appeal 1994 ('the RCA') and para 6 of the Schedule to the CJA, read together with r. 4 of the RCA and O. 92 r. 4 of the Rules of the High Court 1980, clearly empower the Court of Appeal to grant the order of stay sought by the appellants. This interpretation is reinforced by the use of the words "... interim preservation of property ..." and "... or in any other manner whatsoever ..." in para 6 of the Schedule to the CJA. It is also trite that a court which has given a judgment has the power to order a stay. d

[2] Consequently, the Court of Appeal **has** the jurisdiction to stay the execution of an order it has already made pending an application by an appellant to the Federal Court for leave to appeal against such an order of the Court of Appeal, notwithstanding that there is no proceeding pending before the Court of Appeal. e

[3] Further, and in light of s. 79 of the CJA, the appellants' application in the first instance to the Court of Appeal was proper and reasonable. f

[4] If the aforesaid order of the Court of Appeal giving vacant possession to the respondent was not stayed, the appellants' rights would be dissipated and their equity eroded and destroyed before their claims for compensation and damages could be determined and assessed; the appellants' [*application to the Federal Court for leave to*] appeal would be rendered nugatory. g

[5] The Federal Court also has the power to consider the instant application for a stay of execution under s. 80 of the CJA. h

[Application allowed by majority; stay of execution granted.]

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a [Bahasa Malaysia Translation of Headnotes]

b Permohonan semasa melalui notis usul kepada Mahkamah Rayuan adalah untuk satu penangguhan penyempurnaan berhubung dengan penghakiman terdahulu Mahkamah Rayuan dalam memberikan milikan kosong kepada responden. Perintah penangguhan tersebut telah dipohon oleh perayu-perayu sementara menunggu permohonan mereka kepada Mahkamah Persekutuan bagi kebenaran untuk merayu terhadap penghakiman Mahkamah Rayuan yang dikatakan itu.

c Isu undang-undang yang menjadi perkara utama kepada permohonan semasa tersebut adalah samada Mahkamah Rayuan mempunyai bidangkuasa untuk menengguh penyempurnaan sesuatu perintah yang telahpun dibuatnya sementara menunggu permohonan oleh perayu kepada Mahkamah Persekutuan bagi kebenaran untuk merayu terhadap perintah Mahkamah Rayuan yang sedemikian.

d **Diputuskan:
Oleh NH Chan HMR (menentang)**

e [1] Sesuatu rayuan hanya boleh dipindahkan dari Mahkamah Rayuan ke Mahkamah Persekutuan dengan kebenaran Mahkamah Rayuan. Hanya Mahkamah Rayuan sahaja yang berhak memberikan kebenaran sedemikian untuk Rayuan (Akta Mahkamah Kehakiman 1964, s. 96 ('CJA')). Pihak yang tidak berpuashati dengan keputusan Mahkamah Rayuan berhak untuk memohon kebenaran sedemikian dari Mahkamah Persekutuan. Ia adalah, walaupun bagaimanapun, **bukan** hak untuk merayu, tetapi hanyalah hak untuk memohon kepada Mahkamah Persekutuan bagi kebenaran untuk merayu. Hak untuk merayu hanya timbul apabila kebenaran merayu diberikan. Permohonan bagi kebenaran untuk merayu **bukan** satu rayuan.

f [1a] Tiada rayuan berhubung hak dari Mahkamah Rayuan kepada Mahkamah Persekutuan. Oleh itu, melainkan dan sehingga kebenaran untuk merayu diberikan oleh Mahkamah Persekutuan tidak terdapat sebarang rayuan sama sekali di hadapan Mahkamah Rayuan. Keputusan Mahkamah Rayuan adalah muktamad dan tidak boleh dipertikaikan melainkan jika Mahkamah Persekutuan memberikan kebenaran untuk merayu yang sedemikian.

g [1b] Dalam kes yang sama itu, kebenaran untuk merayu masih belum diberikan oleh Mahkamah Persekutuan. Oleh itu, tidak terdapat rayuan yang belum dipindahkan dari Mahkamah Rayuan kepada Mahkamah Persekutuan, dan, oleh itu, tidak terdapat justifikasi untuk Mahkamah Rayuan menengguhkan penyempurnaan penghakiman yang tersebut dari yang mana tidak terdapat hak untuk merayu. Responden berhak ke atas

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hasil penghakimannya. Adalah tidak munasabah untuk menyatakan bahawa ‘rayuan tersebut’ akan diserahkan secara sia-sia jika penangguhan tidak diberikan apabila pada hakikatnya, tidak terdapat sebarang rayuan di hadapan Mahkamah Rayuan.

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[1c] Ianya secara mutlak mustahil untuk menggantung prosiding setelah mendapat penghakiman sesebuah mahkamah daripada mana tiada rayuan menurut haknya. Untuk menangguh penyempurnaan kerana mahkamah berasa sangsi samada ia telah memberikan satu penghakiman yang betul akan menjadi tidak bernilai bagi Mahkamah Rayuan.

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[2] Menurut s. 102 CJA dan A. 52 Kaedah-kaedah Mahkamah Persekutuan 1995 (‘RFC tersebut’), Mahkamah Persekutuan atau Mahkamah Rayuan boleh memerintahkan satu penangguhan **tetapi** hanya apabila terdapatnya rayuan atau apabila kebenaran untuk merayu telah diberikan dan rayuan boleh dimulakan. Permohonan bagi kebenaran untuk merayu adalah **bukan** suatu rayuan.

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[2a] Apabila terdapat rayuan atau apabila kebenaran untuk merayu telah diberikan dan satu rayuan boleh dimulakan, s. 79 CJA dan A. 53 RFC memperuntukan bahawa permohonan untuk penangguhan hendaklah dibuat pertama kalinya kepada Mahkamah Rayuan.

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[3] Seksyen 97(2) CJA memberi kuasa kepada Mahkamah persekutuan, apabila **memberikan kebenaran** untuk merayu, untuk samada mengarahkan penghakiman yang dirayui terhadap supaya dilaksanakan atau memerintahkan satu penggantungan sementara menantikan rayuan. Dalam kes semasa, perayu masih boleh memohon kepada Mahkamah Persekutuan untuk mendapatkan satu penggantungan pelaksanaan di bawah s. 97(2) CJA tersebut.

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Oleh Abu Mansor Ali & Ahmad Fairuz HHMR (majoriti)

[1] Aturan 76, Kaedah-kaedah Mahkamah Rayuan 1994 (KMR) dan perenggan 6 Jadual CJA, dibaca bersama dengan k. 4 KMR dan A. 92 k. 4 Kaedah-kaedah Mahkamah Tinggi 1980, jelas memberi kuasa kepada Mahkamah Rayuan untuk memberikan perintah penangguhan yang dipohon oleh perayu-perayu. Tafsiran mengenai hal ini diperkuatkan lagi oleh penggunaan perkataan-perkataan “... interim preservation of property ...” dan “... or in any other manner whatsoever ...” dalam perenggan 6 Jadual kepada CJA. Adalah juga suatu perkara biasa bagi sebuah mahkamah yang telah memberikan penghakiman mempunyai kuasa untuk memerintahkan penangguhan.

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- a* [2] Sehubungan itu, Mahkamah Rayuan mempunyai bidang kuasa untuk menangguhkan penyempurnaan suatu perintah yang telah dibuatnya sementara menunggu satu permohonan oleh perayu kepada Mahkamah Persekutuan bagi kebenaran untuk merayu terhadap perintah Mahkamah Rayuan yang sedemikian, meskipun tiada prosiding yang belum dilaksanakan dihadapan Mahkamah Rayuan.
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- [3] Selanjutnya, dan memandangkan s. 79 CJA; permohonan perayu dalam cubaan pertama kepada Mahkamah Rayuan adalah berasaakan dan sesuai.
- c* [4] Sekiranya perintah Mahkamah Rayuan yang memberikan milikan kosong kepada responden tersebut tidak ditangguhkan, hak-hak perayu akan hilang dan ekuitinya juga akan terhakis secara perlahan-lahan dan musnah sebelum tuntutan-tuntutan mereka untuk pampasan dan gantirugi dapat dikenalpasti dan dinilai, rayuan perayu (permohonan kepada Mahkamah Persekutuan bagi kebenaran untuk) yang diberikan akan menjadi sia-sia.
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- [5] Mahkamah Persekutuan juga mempunyai kuasa untuk mempertimbangkan permohonan semasa untuk penangguhan penyempurnaan di bawah s. 80 CJA.

e [Permohonan dibenarkan oleh majoriti; penangguhan penyempurnaan diberikan.]

Cases referred to:

- Jennings Construction Ltd v. Burgundy Royale Investments Pty Ltd* (1987) 69 ALR 265 (**not foll**)
- f* *Marconi's Wireless Telegraph Co v. Commonwealth (No 3)* (1913) 16 CLR 384 (**not foll**)
- McBride v. Sandland* (1918) 25 CLR 369 (**refd**)
- McLaughlin v. Daily Telegraph* [1904] 1 CLR 243 (**foll**)
- Nedunchelivan Balasubramaniam v. Kohila Shanmugam* [1997] 4 CLJ 676 (**refd**)
- Quinlan v. Quinlan* [1900] AC 496 (**refd**)

g Legislation referred to:

- Courts of Judicature Act 1964, ss. 42, 43, 44, 79, 80, 96, 97(2), 102, para 6 of Schedule
- Rules of the Court of Appeal 1994, rr. 4, 76
- Rules of the Federal Court 1995, rr. 52, 53
- h* Rules of the High Court 1980, O. 92 r. 4

For the appellants - Sivarasa Rasiyah (Anni Santiago & Yasmeen with him); M/s Mahani Hamid & Yasmeen

For the respondent - VS Viswanathan; M/s TH Su & Co

i Reported by Gan Peng Chiang

JUDGMENT**NH Chan JCA:**

This is an application by notice of motion to the Court of Appeal for a stay of execution on a judgment of the Court of Appeal pending an application to the Federal Court for leave to appeal. An appeal can only lie from the Court of Appeal to the Federal Court with the leave of the Federal Court; see s. 96 of the Courts of Judicature Act 1964 which reads:

96 Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court granted in accordance with s. 97:

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction;

The section recognises that only the Federal Court has a right to grant leave to appeal to that court. And a person who is dissatisfied with the decision of the Court of Appeal has a right to apply for that leave from the Federal Court. It is not a right to appeal. It is only a right to apply to the Federal Court for leave.

There is no appeal as of right from the Court of Appeal to the Federal Court so that unless and until leave to appeal has been granted by the Federal Court, there is no appeal at all in the Federal Court. The decision of the Court of Appeal is final unless the Federal Court chooses to grant such leave.

And s. 97 reads:

97(1) An application under s. 96 for leave to appeal to the Federal Court shall be made to the Federal Court within one month from the date on which the decision appealed against was given, or within such further time as may be allowed by the Court.

(2) Where the judgment appealed against requires the appellant to pay money or perform a duty, the Federal Court shall have power, when granting leave to appeal, either to direct that the judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the court shall seem just; and in case the court shall direct the judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security to the satisfaction of that court for the due performance of any order as the Federal Court may make in order to give effect thereto.

- a* In the instant case, leave has yet to be granted by the Federal Court to appeal to that court from the judgment of the Court of Appeal. As there is no appeal which is pending from the Court of Appeal to the Federal Court, there is no justification for the Court of Appeal to stay execution on its judgment from which there is no right to appeal. "... it is absolutely unheard of to stay proceedings upon the judgment of a court from which there is no appeal as of right." said Griffith CJ in the Australian High Court case of *McLaughlin v. Daily Telegraph* [1904] 1 CLR 243, at 283. In *McLaughlin*, counsel for the respondents applied to the High Court for a stay of proceedings pending an application to the Privy Council for special leave to appeal to the Board. Griffith CJ, in delivering the judgment of the High Court (Griffith CJ, Barton and O'Connor JJ), said (283):

- d* There is no doubt that the court has power to stay execution of its judgments, but in this case the Constitution has provided that the court's decision shall be final and conclusive. It is true that the Judicial Committee may give leave to appeal from our judgment. Under the system of appeals from State Courts to the Privy Council the appeal lay as of right, but it is absolutely unheard of to stay proceedings upon the judgment of a court from which there is no appeal as of right. To stay execution because the court doubted whether it had given a proper judgment would be unworthy of a Court of Appeal. The application must be refused.

- e* Likewise, as in the instant case, the judgment of the Court of Appeal is final and conclusive unless the Federal Court chooses to permit an appeal to that court.

- f* *McLaughlin v. Daily Telegraph Newspaper* was cited with approval by Barton J in another Australian High Court case *McBride v. Sandland* [1918] 25 CLR 369 at 372. He said:

- g* If this were an application to the High Court itself to stay proceedings upon the judgment of the High Court in the previous action between the same parties, what was said by the learned Chief Justice in *McLaughlin v. Daily Telegraph Newspaper Co.* [1904] 1 CLR 243 at 283, would be precisely applicable.

However, Barton J after stating that the judgment of Griffith CJ in *McLaughlin* (which we have reproduced above) would be precisely applicable, went on further to say (372, 373):

- h* The High Court itself would not grant a stay of execution of one of its own judgments pending an application to the Privy Council for special leave to appeal from that judgment, unless there were some special or peculiar grounds, as indeed there were in the case of *Marconi's Wireless Telegraph Co. v. Commonwealth (No. 3)* [1913] 16 CLR 384. But it must be borne in mind, in

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respect of all applications for a stay pending an appeal from the High Court to the Privy Council, that there is no appeal of right, and therefore the citing of cases in which there was a right of appeal is beside the question in this case.

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The question is, was Barton J right in his opinion that where there were some special or peculiar grounds, a stay of execution could be granted pending an application to the Privy Council for leave to appeal from the judgment of the High Court of Australia even though there is no appeal of right. Barton J relied on his own decision in *Marconi's Wireless Telegraph Co. v. Commonwealth* (No. 3) [1913] 16 CLR 384, which is also a decision of the High Court. The headnote (384, 385) reads:

b**c**

In an action against the Commonwealth for infringement of patent the High Court had, on the application of the plaintiffs, made an order for inspection against the Commonwealth. A motion for a stay of proceedings under the order, pending an application to the Privy Council for special leave to appeal, was made by the Commonwealth, and the circumstances were such that unless a stay was granted the appeal would be rendered nugatory, and that if it was simply granted the whole benefit of the action might be lost to the plaintiffs.

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Held, that proceedings should be stayed until the hearing of the application to the Privy Council, on the Commonwealth undertaking to expedite the application and to pay such damages, whether legally claimable or not, as the High Court or a justice thereof might think just and fair as compensation to the plaintiffs for any damage they might sustain by reason of the stay.

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Barton ACJ, in delivering the judgment of the court (Barton ACJ, Isaacs and Rich JJ) said (at p. 386):

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The court will not ordinarily grant an application of this kind unless very strong and special grounds are shown. This is a very peculiar case. The conditions are such that, on the one hand, if the stay is granted without more, the whole benefit of the action may be lost to the plaintiffs, while, on the other hand, unless the stay is granted on some fair terms, the defendants' appeal will be nugatory. It really is a question of the preservation of the rights of the parties without disregard of the balance of convenience. Under those circumstances we think that the order we propose to make is a fair one.

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Barton J thought that if very strong and special grounds are shown, a stay of the order of the High Court could be granted pending the obtaining of leave from the Privy Council. And the ground relied on in *Marconi* was that, "unless the stay is granted on some fair terms, the defendants' appeal will be nugatory." But, the fallacy of this reasoning is that the judge had completely overlooked the fact that (until an appeal has been permitted by the Privy Council) the judgment or order of the High Court was final and conclusive since there was no right to appeal. How can there be an appeal which will

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a be nugatory when there is, in fact, no appeal at all. In reality, as it appears later, Barton J seems to have recanted from this view; see *McBride v. Sandland (supra)* where he said at 373, 374:

b The grounds upon which Buchanan J acted are practically, as far as we know (and no others are suggested), that without a stay the appeal to the Privy Council might be nugatory, that the appellant could not be prejudiced, and that it was not suggested that the application to the Privy Council was not *bona fide* or was for delay. It may be granted that the application was *bona fide* and was not undertaken for delay. But in any case there was no appeal as of right. An appeal could not be entertained unless and until special leave to appeal was granted.

c There is no right to appeal from the decision of the Court of Appeal. There is only a right to apply to the Federal Court for leave to appeal to that court. Since there is no appeal as of right from the Court of Appeal to the Federal Court, the decision of the Court of Appeal is final and conclusive and an appeal could not be entertained unless and until the Federal Court chooses to permit an appeal from the Court of Appeal to that court. As long as the decision of the Court of Appeal remains final and conclusive, there is no justification (the general principle is that a successful party is entitled to the fruits of his judgment) for the Court of Appeal to grant a stay of its order.

d When there is no appeal at all to the Federal Court (for without leave of that court there can be no appeal), it is absurd to say that “without a stay the appeal to the [Federal Court] might be nugatory.”

e Section 102 of the Courts of Judicature Act 1964 and r. 52 of the Rules of the Federal Court 1995 will apply only when an appeal has been instituted.

f An application for leave to appeal is not, in my judgment, an appeal. See per Brennan J in *Jennings Construction Ltd v. Burgundy Royale Investments Pty Ltd* [1987] 69 ALR 265, at 266. He said (in the High Court of Australia sitting as a single judge):

g The applicant invoked s. 77u of the Judiciary Act 1903 (Cth) as a source of the jurisdiction to stay but that section applies only when an appeal has been instituted. An application for special leave to appeal is not, in my opinion, an appeal within the definition of that term in s. 2 of the Judiciary Act.

h Section 102 and r. 52 provide for the Federal Court or the Court of Appeal to order a stay only when there is an appeal or when an appeal could be instituted (as when leave has been granted).

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In the event when there is an appeal or when an appeal could be instituted, s. 79 of the Courts of Judicature Act and r. 53 of the Rules of the Federal Court provide that the application be made in the first instance to the Court of Appeal.

Section 97(2) of the Courts of Judicature Act empowers the Federal Court “when granting leave to appeal, either to direct that the judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the court shall seem just; and in case the court shall direct the judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security to the satisfaction of that court for the due performance of any order as the Federal Court may make in order to give effect thereto.”

There are no statutory provisions similar to our s. 97(2) applicable to the High Court of Australia. In the days when the Privy Council was the final Court of Appeal, it had no jurisdiction to order a stay of execution. See *Quinlan v. Quinlan* [1900] AC 496. Lord Davey, in delivering the judgment of the Board (Lord Davey, Lord Robertson, Lord Lindley, Sir Henry De Villiers, and Sir Ford North) said, at 498:

With regard to that part of the prayer of the petition which asks their Lordships to stay the sale advertised for 26 May pending the appeal, their Lordships have no jurisdiction to make an order for that purpose.

So that the position of the High Court of Australia is similar to that of the Privy Council when it was the final Court of Appeal. The difference is that while the Privy Council accepted the fact that it had no jurisdiction to grant a stay of execution pending an appeal to the Council (presumably, on the principle that an appeal shall not operate as a stay without statutory intervention), the High Court of Australia chose to take the path of judicial legislation by creating a jurisdiction to grant a stay where none had existed before; see *Jennings Construction Ltd v. Burgundy Royale Investments Pty Ltd* 69 ALR 265. This is how it was put by Brennan J at 267:

A stay to preserve the subject matter of litigation pending an application for special leave to appeal is an extraordinary jurisdiction and exceptional circumstances must be shown before its exercise is warranted. If an order for a stay is made, the respondent is kept out of the benefit of the order of the court in which the matter is pending until the hearing of the application for special leave to appeal. That was the situation to which this court adverted in *Marconi's Wireless Telegraph Co Ltd v. Commonwealth (No 3)* [1913] 16 CLR 384. There the court granted an order staying the operation of one of its own orders pending the hearing of an application to the Privy Council for special leave to appeal. What the court said in that case, at 386, is applicable

- a* to this case: "The court will not ordinarily grant an application of this kind unless very strong and special grounds are shown. This is a very peculiar case. The conditions are such that, on the one hand, if the stay is granted without more, the whole benefit of the action may be lost to the plaintiffs, while, on the other hand, unless the stay is granted on some fair terms, the defendants' appeal will be nugatory. It really is a question of the preservation of the rights of the parties without disregard of the balance of convenience.
- b*

Fortunately for us in this country, our legislators had the hindsight to enact s. 97(2) of the Courts of Judicature Act which empowers the Federal Court to grant a stay pending an appeal to that court when granting leave.

- c* When there is no right to appeal (as when leave has not been obtained), the judgment of the Court of Appeal is final and conclusive. The ordinary principle is that a successful party is entitled to the fruits of his judgment. That being so, there is no justification (as it is neither an injustice nor an abuse of the process of the court to follow the principle) for the Court of Appeal to suspend the right of the successful party to the fruits of his judgment.
- d*

- When there is a right to appeal (as when leave has been granted), there is still the principle that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from. However, statutory provisions (such as ss. 97(2) and 102 of the Courts of Judicature Act) may empower a court or courts to order a stay or suspension of the decision appealed from pending the appeal.
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- Finally, I must advert to *Neduncheliyan Balasubramaniam v. Kohila a/p Shanmugam* [1997] 3 MLJ 768 which is a decision of the Court of Appeal and binding on this court. This is what Shankar JCA, in delivering the judgment of the court (Mahadev Shankar and Denis Ong JJCA, Mokhtar Sidin JCA absent with the consent of the parties under s. 42 Courts of Judicature Act 1964), said, at 793, 794:
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- The grounds for the stay were that the appeal to the Federal Court would be nugatory if the children were taken out of the jurisdiction by 24 August 1997. Mr Bachan submitted that his intention was to ensure that the children should remain in Malaysia until the appeal has been disposed of by the Federal Court. He submitted that if the children were not here until then, the appeal would be academic.
- g*

- h* And he concluded (794):

Any appeal to the Federal Court would require leave, which may or may not be granted after that court had considered the judgment of this court.

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Kohila was entirely at liberty to apply to the Canadian courts at any time to grant her custody of the children.

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In the circumstances, if any application for stay was to be made at all, we felt that such an application had to be made, not here, but in the Federal Court.

In my judgment an application for leave to appeal is not an appeal. Section 102 of the Courts of Judicature Act and r. 52 of the Rules of the Federal Court empower the Federal Court or the Court of Appeal to order a stay only when there is an appeal. Since there is no appeal (because an application for leave to appeal is not an appeal), the judgment of this court is final and conclusive. That being so, I am of the view that there is no justification for this court to suspend the right of the successful party to the fruits of his judgment. That that is so is as far as the jurisdiction of this court is concerned. The aggrieved party can still apply to the Federal Court for a stay under s. 97(2) of the Courts of Judicature Act.

*b**c*

Abu Mansor Ali JCA:

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The applicants/appellants lost their appeal in the Mahkamah Rayuan on 20 January 1998 and on confirmation of the Shah Alam High Court Order they were ordered to give vacant possession of their premises to the respondent. They have now applied to have leave of the Federal Court to appeal against that Court of Appeal decision. They now move this court for a stay of the Court of Appeal order of vacant possession until such time that they can have their leave application heard by the Federal Court. The application of the applicants/appellants before us therefore is for the preservation of the property by this court pending the hearing of their leave to appeal application before the Federal Court.

*e**f*

The issue is whether this court has jurisdiction to make an order. Counsel for the appellant contends that we have by virtue of r. 76 of the Rules of the Court of Appeal 1994 and also by virtue of item 6 of the Schedule to the Courts of Judicature Act 1964, reading it with r. 4 of the Court of Appeal Rules 1994 again reading these together with O. 92 r. 4 to the High Court Rules 1980.

g

We will now examine these separate provisions. Rule 76 of the Court of Appeal Rules 1994 provides:

h

76. Ancillary powers of the court

The court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the court.

i

a Then item 6 of the Schedule to the Courts of Judicature Act 1964 reads:

6 Preservation of property

b Power to provide for the interim preservation of property the subject-matter of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a *lis pendens* or in any other manner whatsoever.

Reading it with r. 4 of the Court of Appeal Rules 1994 we have:

4 Application of Rules of the High Court 1980

c Where no other provision is made by any written law or by these Rules, the procedure and practice in the Rules of the High Court 1980 shall *mutatis mutandis* apply.

Then lastly we have O. 92 r. 4 of the High Court Rules 1980 gives:

d 4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

e On the other hand the respondent's counsel contends that there is nothing pending before us and therefore that matter should really be dealt with by the Federal Court before which an application for leave to appeal is pending. We have no quarrel with that contention but the provisions referred to by the appellants' counsel clearly empower this court to grant the appellants' application and s. 79 of the Courts of Judicature Act 1964 reads:

f 79 Applications

Whenever application may be made either to the Court of Appeal or to the Federal Court, it shall be made in the first instance to the Court of Appeal.

g The appellants have therefore correctly made this application before this court. This application, in our view, is also proper and reasonable because it is trite law that a court who has given judgment certainly has the power to order stay. We say we have jurisdiction and we hereby allow the Motion with no cost.

h Since the Motion was for the purpose of ascertaining whether this court has jurisdiction to entertain this application, this court had decided by a majority of two to one that it has and hence we allowed the appellants/applicants to proceed to address us on the merit of their application for a stay.

i

After hearing the applicants' counsel, we were persuaded to grant him a stay of the Court of Appeal Order and that of the High Court until the disposal of the leave application to appeal against the Court of Appeal decision of 20 January 1998.

Mr. Sivarasa for the applicants convinced us that no doubt that the applicants' claim is for compensation nonetheless if we were not to stay the respondent's vacant possession order before the hearing of the applicants' leave to appeal, it is clear the applicants' right to be there would be dissipated and gone before the appellants can have their several claims assessed and determined and their equity would largely have been eroded and destroyed. We were unanimous that to that extent the applicants' appeal would be nugatory. How can it not be so when what is left would be empty fields? We, therefore, allow the applicants' application for a stay of the Court of Appeal order for vacant possession of 20 January 1998 until the disposal of the applicants' application for leave to appeal in the Federal Court with cost of this application in the appeal.

Ahmad Fairuz JCA:

The Notice of Motion before this court shows that the application is for a stay of execution of the order of the High Court Shah Alam (which is at p. 48 of the Motion Record). That Order had been confirmed by the Court of Appeal (see p. 18 of the Record).

Paragraph 9 of the affidavit in support of the Motion particularly stresses that if the High Court Order is not stayed then the respondent will demolish the applicants' premises. This will consequently render their application for leave to appeal to the Federal Court nugatory as even if they succeed in their leave application and eventually in their appeal, their premises, the subject matter of the appeal, will already be irretrievable. Hence, the stay of execution of the High Court order is necessary in order to give any meaningful purpose to their application for leave to appeal. It is to be noted that when the applicants appealed to the Court of Appeal, the High Court granted a stay order to the applicants. I realise that in the circumstances of the applicants' appealing to the Court of Appeal, s. 44 of the Court of Judicature Act 1964 (hereinafter referred to as 'the CJA') empowers the Court of Appeal to grant the stay whilst the High Court too has the power to grant the stay; and by virtue of s. 43 of the CJA the application has to be made in the first instance to the High Court. This the applicants did and in fact obtained the stay order. But what this court is now faced with is the question of whether it can grant a stay when there is no proceeding pending before it. If there is, then s. 44 of the CJA would apply. The Federal Court however, in my opinion, has the

a power to consider and grant or refuse this application under s. 80 of the CJA as the application for leave to appeal is a proceeding then pending before the Federal Court. Faced with these provisions of law the learned counsel for the applicants drew this court's attention to para. 6 of the Schedule to the CJA which reads:

b **6. Preservation of property**

Power to provide for the **interim preservation of property** the subject-matter of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a lis pendens **or in any other manner whatsoever.**

c In this connection I would like to emphasise the words "interim preservation of property" and "or in any other manner whatsoever" used in that paragraph. Clearly therefore this para. 6 enables the High Court to consider and grant or refuse such an application as is now before this court. The learned counsel
d then proceeded to cite r. 76 of the Rules of the Court of Appeal 1994 which reads:

e The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

f This rule, to my mind, clearly empowers the Court of Appeal to exercise the powers under the aforesaid para. 6 of the Schedule. These provisions are sufficient, in my opinion, to give this Court of Appeal the jurisdiction to consider the application now before this Court.

Before moving to the merits of the application, I would like to refer to what Brennan J said in *Jennings v. Burgundy Royale* (1987) 69 ALR 265 at 267, that is:

g When an application for special leave to appeal is made to this court, a jurisdiction to stay may be exercised by the court below and it is to that court – the court in which the matter is pending and which is familiar with the matter – that an application to stay should first be made. In this case the Court of Appeal, not wishing to pre-empt the view that may be expressed in this court, tailored its order accordingly. In future, there should be no inhibition on the
h court in which the matter is pending framing a stay order, if a stay be appropriate, to avoid the necessity for application to this court.

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In this connection our s. 79 of the CJA clearly requires the application to be made in the first instance to the Court of Appeal. Hence the applicants made this application in this court.

As to the merits of the application, I am of the view that the applicants' premises should be preserved. The destruction of their premises will, as contended in para. 9 of their affidavit in support, cause them to suffer losses, hardships and difficulties which are irremediable (mengalami kerugian, penderitaan dan kesusahan yang tidak boleh dibaiki). I find no evidence that can show that such contention of the applicants as inherently improbable. Furthermore, the applicants in their counterclaim (see p. 121 of the Record) have, amongst other things, sought for a declaration that they have a right to remain on the land in question until their equities are being satisfied in the form of compensation and damages. If a stay is not granted, then, the very grant of vacant possession to the respondent will mean the destruction of that right. From then on, any success in the application for leave to appeal or eventually in the appeal itself will be meaningless as that right can never be restored. Thus, a stay is necessary to ensure that that right would be available to the applicants in the event that the Federal Court decides their application for leave to appeal in their favour. Hence, any refusal to grant the stay would render the application for leave to appeal, or the appeal itself, if the Federal Court allows the application for leave to appeal, nugatory. For these reasons I allow the application of the applicants to the extent that the execution of the order of the High Court Shah Alam shall be stayed forthwith until the disposal of the applicants' application for leave to appeal. Costs is granted as prayed in the application.

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